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COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

In re BRITTNEY Y., a Person Coming Under
the Juvenile Court Law.

COUNTY OF SAN BERNARDINO
DEPARTMENT OF CHILDREN'S
SERVICES,

Plaintiff and Respondent,

v.

KATHLEEN B.,

Defendant and Appellant.

E029709

(Super.Ct.No. J146736)

O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Donna G. Garza,
Judge. Affirmed.

Anna L. Ollinger, under appointment by the Court of Appeal, for Defendant and
Appellant.

Alan K. Marks, County Counsel, Joanne Fenton, Deputy County Counsel, for
Plaintiff and Respondent.

Jacquelyn E. Gentry, under appointment by the Court of Appeal, for Minor.

After a hearing pursuant to Welfare and Institutions Code section 366.26,¹ the trial court terminated the parental rights of Kathleen B. (Mother) to her daughter Brittney Y. Mother appeals contending (1) the trial court lacked authority to order a permanent plan of adoption for a child whose guardianship was ordered under section 360; (2) there was no showing of changed circumstances to warrant a new plan of adoption; and (3) parental rights may not be terminated unless reunification services were offered or denied.

PROCEDURAL BACKGROUND AND FACTS

Brittney Y. was born in September 1989.² She was seven years old when she was taken into protective custody on October 22, 1996. Mother was incarcerated on a burglary warrant and Brittney's alleged father, Timothy Y., was incarcerated in state prison. On October 24, 1996, the Department of Children's Services (Department) filed a section 300 petition on behalf of Brittney, which was later amended to allege that she had suffered severe sexual abuse including digital penetration, transmission of a sexual disease, and that Mother had sold Brittney for money to Roger S., Mother's boyfriend, for the taking of pornographic pictures. It was also alleged that Mother had previously failed to protect Brittney from Michael W., a known sex offender, which also resulted in digital penetration, fondling, and sexually transmitted disease.

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

² On our own motion, we take judicial notice of the contents of the record in Mother's prior appeal pursuant to California Rules of Court, rule 39.1B. (Evid. Code, § 452, subd. (d).)

In the jurisdictional-dispositional report, the social worker related that Brittney was diagnosed as having a sexually transmitted virus of the vagina, primarily found in adults. In 1996, Mother's 11-month-old son had wandered into a swimming pool and drowned while Mother was sleeping. The Department received referrals that Mother was exploiting Brittney for child pornography. In October 1996, police searched for Brittney and Mother by going to various residences and motels, finally locating them at the Samaritans Helping Hand Shelter. Brittney told the social worker they would stay for weeks at a time in an abandoned shack in Victor Valley. At the assessment center, Brittney disclosed to Dr. Sheridan that she was having nightmares and sleep disturbance. Brittney was detained with her maternal aunt. Reunification services were not recommended; instead, it was recommended that a permanent plan hearing be set to consider termination of parental rights.

Brittney received a psychological assessment by Dr. June Hayes on November 12, 1996. She had no major behavioral problems other than difficulty differentiating right from wrong in terms of sexuality and modesty. She was very protective of Mother and would not admit any sexual abuse or the taking of pornographic pictures. In testing, Brittney was generally above age expectations. Dr. Hayes recommended prolonged psychotherapy by a person skilled in treatment of child sexual abuse.

A second amended dependency petition was filed on December 5, 1996. The social worker's report noted that in 1995, Brittney had been living with her maternal aunt and attending school, but Mother had abruptly removed her from school in December 1995, without the aunt's knowledge. In 1996, Brittney was placed with her maternal aunt on three

separate occasions. During her time with Mother, Brittney had been sexually molested by Mother's friends twice. Nonreunification and termination of parental rights were again recommended.

In an addendum to the jurisdictional/dispositional report, the social worker noted that Brittney was experiencing intense anxiety, nightmares, nervousness, trauma, and she was displaying a nontrusting attitude, which according to the aunt, was based on Brittney's fear that Mother would remove her from her placement. Since her release from custody, Mother had tested positive three times for methamphetamines. The social worker recommended that reunification services be denied pursuant to subdivision (b)(6) of section 361.5, on the basis that Mother received financial gain from the sexual molestation and exploitation of Brittney.

At the jurisdictional-dispositional hearing on the second amended petition held on January 17, 1997, Mother executed a waiver of rights and submitted on the social worker's report. Mother was informed of her constitutional rights and the court found that she understood and waived them. When the matter was taken up again that afternoon, Mother's attorney explained an agreement had been reached, and Mother had left before the matter had been called. Brittney was declared a dependent, reunification services were not ordered pursuant to section 360, and a permanent plan hearing under section 366.26 was set for April 7, 1997. The recommended permanent plan was guardianship and a guardianship assessment was ordered.

At the section 366.26 hearing on April 29, 1997, Mother was present and counsel submitted on the social worker's report which described Brittney as developing a feeling of

security and having a strong bond with her guardians. Guardianship was found to be the appropriate permanent plan and guardianship orders were issued. Visitation between Brittney and Mother was ordered and the dependency was terminated.

Two years later, on April 26, 1999, Mother filed a section 388 petition seeking unsupervised visitation, including overnight visits, and termination of guardianship. As a change of circumstances, she offered the completion of a parenting course, commencement of individual counseling, regular employment, living in the same residence for approximately two years, and payment of child support for Brittney. On May 11, the court denied Mother's petition. Although it found there had been a change in circumstances, the court found the requested relief would not be in Brittney's best interests.

On December 7, 1999, Mother initiated a contempt proceeding alleging the guardians had failed to follow the court's orders regarding her visitation and phone contact with Brittney. On December 14, the social worker filed a section 388 petition seeking to change Brittney's permanent plan of guardianship to adoption. The changes of circumstances alleged were that Brittney wished to be adopted, and her guardians were willing and able to adopt her. After several continuances, both matters were set to be heard on March 23, 2000 and continued to April 27, 2000.

According to the social worker's report prepared for the section 388 hearing, Brittney was described as a bright and well-mannered 10-year-old enrolled at school in a program for gifted children. During a visit on November 23, 1999, Mother and Brittney's aunt engaged in a verbal confrontation in front of Brittney. Mother had yelled profanities

and told Brittney it was her fault for getting molested and telling people about it. She said it was Brittney's fault because she never told her (Mother) about the sex stuff. Brittney was crying and hiding her face.

On December 6, 1999, Brittney told the social worker that she wanted to be adopted by her aunt. They discussed the meaning of adoption. To Brittney, it meant that Mother could not come and try to take her away anymore. Brittney also said it meant her aunt and uncle would be her mom and dad and say what was okay for her or not. On February 11, 2000, Brittney told the social worker that she did not want to visit with Mother until adoption proceedings were completed. It was the social worker's opinion that Brittney had no desire to reunite with Mother and wanted to get on with her life without the fear that Mother would get her back. The social worker opined that it was in Brittney's best interest to be adopted by her aunt and uncle because she had made her decision and was wise beyond her years.

Regarding the contempt issue, the social worker testified that she had received a complaint from Mother about visitation. Brittney's aunt claimed her Fifth Amendment rights on the advice of counsel and did not answer any questions. Mother testified that she was not allowed a weekly visit with Brittney between April 20, 1997 and May 11, 1999. Mother stated that she had given Brittney's aunt a copy of the court's order of May 11, 1999, and the aunt allowed bi-weekly visits until November 23, 1999, when visitation stopped.

Mother had supported the idea that the aunt have guardianship of Brittney. She stated that she had not known and did not believe the guardians, her sister and brother-in-law,

wished to adopt Brittney. She had not been told Brittney wanted to be adopted by her guardians, although she did know a section 388 petition had been filed seeking to terminate her parental rights. Mother had not seen Brittney since January 10, 2000. Based on a lack of specificity in the pleading, the fact that weekly visits were not mandated, and insufficient specificity as to which visits were complained of, the order to show cause was discharged and the contempt hearing ordered off calendar.

On the section 388 petition, the social worker's March 23, 2000, report was admitted into evidence. The social worker testified that during an interview with Brittney, Brittney brought up the fact she did not want to visit Mother until she was adopted. She repeatedly expressed her desire to be adopted by her aunt and uncle. Brittney and her aunt informed the social worker about an incident that took place at the visitation on November 23, 1999. Brittney stated that Mother yelled at her saying the sexual abuse was all her fault. Her aunt was present at the interview because Brittney requested it. Her aunt testified that she had monitored all of Mother's visits with Brittney and on several occasions Mother left from 5 to 30 minutes early. Almost always Mother brought someone with her to the visits, including men the guardian did not know.

Brittney testified that she was 10 years old and in the fifth grade. She last saw her Mother for a visit in January 2000. She stated that she wanted to be adopted "[b]ecause where I'm living now is a very good home and I don't want what had happened to me happen to me again." Brittney realized that if she were adopted, it would not just be up to her whether she saw Mother again or not. Brittney loved her aunt and uncle and called them

mom and dad. She wanted the judge to make them legally her mom and dad. It would make her feel safe.

The court granted the petition for modification and set a section 366.26 hearing for August 24, 2000. Mother filed a writ pursuant to California Rules of Court, rule 39.1B, that was denied.

On August 24, 2000, Mother filed a section 388 petition requesting a postponement of the section 366.26 hearing, one-hour weekly visitation, a complete psychological evaluation of Brittney, and a review hearing to determine if psychological counseling should be ordered for Brittney.

An addendum adoptability report was prepared that was very favorable to freeing Brittney for adoption by her guardians. In response to Mother's section 388 petition regarding therapy for Brittney, the social worker opined that Brittney did not need therapy at present; instead, she needed a chance to live a normal life.

On January 18, 2001, the court found that the issues raised in Mother's section 388 petition had been previously litigated, and the changes proposed would not be in Brittney's best interest. The section 388 petition was denied.

On June 5, 2001, Brittney testified at the section 366.26 hearing. She said she wanted to be adopted and live with her aunt and uncle because she loves them and knows nothing bad will happen to her like it did when she lived with her Mother. Brittney wanted to be able to see Mother in the future, but not right away, maybe in a year.

After argument, the court noted that Brittney and Mother had a love for each other, but that it did not rise to the level of what was in Brittney's best interest. It was in her best

interest to be adopted. Parental rights were terminated, and the court made a special finding that on January 17, 1997, there existed a basis for denying reunification services to Mother pursuant to section 361.5, subdivisions (b)(6) and (e)(1).

SECTION 360

Mother contends the trial court lacked authority to order a permanent plan of adoption for a child whose guardianship was ordered under section 360. We disagree.

Section 360, in relevant part, provides: “(a) Notwithstanding any other provision of law, if the court finds that the child is a person described by Section 300 and the parent has advised the court that the parent is not interested in family maintenance or family reunification services, it may, in addition to or in lieu of adjudicating the child a dependent child of the court, order a legal guardianship, appoint a legal guardian, and issue letters of guardianship, if the court determines that a guardianship is in the best interest of the child, provided the parent and the child agree to the guardianship, . . . The court shall advise the parent and the child that no reunification services will be provided as a result of the establishment of a guardianship. . . . [¶] Any application for termination of guardianship shall be filed in juvenile court in a form as may be developed by the Judicial Counsel pursuant to Section 68511 of the Government Code. Section 388 shall apply to this order of guardianship.”

As the record reflects, Brittney’s guardianship was established pursuant to section 360 and was to remain under the supervision of the court. Section 366.3 provides that when a guardianship is established under section 360 or 366.26, the court may maintain jurisdiction over the child as a dependent or a ward of the guardianship. Furthermore,

subdivision (c) of that section requires the Department to notify the court if it becomes aware of changed circumstances that indicate adoption may be an appropriate plan for the child. “The court may vacate its previous order dismissing dependency jurisdiction over the child and order that a hearing be held pursuant to Section 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child.” (§ 366.3, subd. (c).)

Because section 366.3 specifically applies to guardianships like the one established for Brittney, the court had jurisdiction to consider changes to her guardianship, including a change to the permanent plan of adoption. Here, the changed circumstances were Brittney’s desire to be adopted by her guardians and her guardians’ desire to adopt her. The Department properly brought this change in circumstances to the court’s attention by filing a section 388 petition. Upon granting the petition, the court set a section 366.26 hearing, as prescribed by section 366.3. (*In re Andrea R.* (1999) 75 Cal.App.4th 1093, 1107.)

CHANGED CIRCUMSTANCES

Next, Mother claims there was no showing of changed circumstances to warrant a new plan of adoption. Again, we disagree. The fact that Brittney wanted to be adopted and her guardians wanted to adopt her is sufficient evidence of a change in circumstances to warrant a new plan of adoption. We recognize that Brittney still loved her Mother. Likewise, we commend Mother for her accomplishments in attempting to turn her life around. However, Brittney did not want to resume living with Mother. As the court observed, Mother’s accomplishments did not rise to the level of what was in Brittney’s best interest. Instead, it was in her best interest to be adopted.

TERMINATION OF PARENTAL RIGHTS

Reunification services are a benefit, not an entitlement. (*In re Joshua M.* (1998) 66 Cal.App.4th 458, 476.) Mother argues parental rights may not be terminated unless reunification services were offered or denied. Her argument is misplaced. In this case, the Department consistently recommended that reunification services be denied under section 361.5, subdivision (b)(6). On January 17, 1997, at the disposition hearing, the court ordered reunification services denied in accordance with section 360. Clearly, Mother's claim that reunification services were not offered, were not provided, failed, or were denied contradicts the facts in the record. Also, after denying reunification services, the court set a section 366.26 hearing to determine the most appropriate permanent plan. At that time, the Department limited its recommendation to legal guardianship.

As the Department correctly points out, the guardianship was a disposition authorized pursuant to section 360, subdivision (a) and implemented pursuant to a section 366.26 hearing. At the section 366.26 hearing, Mother waived her constitutional and statutory rights to a hearing on the dependency petition. Although the dependency was dismissed upon implementation of the permanent plan of guardianship, the guardianship established by the court continues under the court's jurisdiction, subject to sections 366.3 and 388. Furthermore, the guardianship may be modified as circumstances warrant. Here, the circumstances definitely warranted it.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

WARD

J.

GAUT

J.